MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW FACULTY OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE, $2.50 PER YEAR. 35 CENTS PER NUMBER

NOTE AND COMMENT

THE FEDERAL COURTS AND LOCAL LAW IN PORTO RICO.—A recent decision of the Supreme Court of the United States further manifests the policy of that court not to interfere with the civil law system in vogue in the territory acquired by the United States, as a result of the Spanish-American War, any more than is necessary to protect the interests of the people of those countries.

The case of *José Antonio Fernandez y Perez* v. *José Perez y Fernandez,* decided in the Supreme Court of the United States, on April 23, 1906, came to it on writ of error to the District Court of the United States, for the District of Porto Rico. In the lower court an action was begun, in 1901, by the defendant in error to recover in an action for "trespass upon the case for wrongful attachment." A writ of attachment had been levied upon the premises of the defendant in error and notice posted thereon. The attachment had afterwards been vacated. The suit for damages for wrongful attachment had been tried before a jury in the District Court and a verdict for $7,000 damages was given. *Held,* by the Supreme Court of the United States, that the United States District Court had no jurisdiction of this action and consequently that the proceedings had therein were null and void.

From the brief of the attorneys for the plaintiff in error it seems that it has been the custom of the United States District Court in Porto Rico, ever since its establishment, "to exercise a common law jurisdiction exactly as do Federal courts in common law states like Illinois." In this particular case the attachment proceeding complained of was commenced in January, 1901, in the military court, known as the United States Provisional Court for the Department of Porto Rico. After the serving of the usual summons upon the defendant, the levying of the writ and the posting of the notice on the premises attached, the proceeding had been stayed by an injunction issuing out of the United States District Court, granted on the grounds that the plaintiff in attachment, who sued as an executor of a will probated in Spain, had not taken out ancillary letters in Porto Rico. The affidavit in attachment had been sworn to by José Antonio Fernandez y Perez, and against him the verdict for wrongful attachment had been brought in.

Section 34 of the Foraker Act established a United States District Court for Porto Rico and gave to it in addition to the ordinary jurisdiction of a District Court of the United States, jurisdiction of all cases cognizant in the Circuit Courts of the United States, and provided that it should proceed therein in the same manner as a Circuit Court, "the intention of Congress evidently being," as Mr. JUSTICE DAY says in his opinion, "to require the District Court exercising the jurisdiction of a Circuit Court, in analogy to the powers of the Circuit Courts in the States, to adapt itself, save in the excepted cases of equity and admiralty, to the local procedure and practice in Porto Rico." The "provisional seizure" law in force in Porto Rico is a most admirable and complete attachment act. (See Title XIV, Law of Civil Procedure for Porto Rico, War Department Translation, Article 1395 *et seq.*) The theory of these sections of the Code is that when the court which issues the attachment is satisfied that the same has been wrongfully issued, it will proceed in the manner pointed out by the statute to ascertain the loss and damages which the defendant has suffered, and in the same action to tax the costs against the plaintiff and to adjudge him to indemnify the defendant for such losses and damages. These proceedings, which immediately follow as soon as the defendant in attachment has been declared entitled to recover damages, are said by the United States Supreme Court, "to preclude the application of general provisions of the Civil Code giving a right of recovery for acts of fault or negligence."

It is worthy of note that our Supreme Court finds no difficulty in resting its decision on the statement of a text book writer, according to the continental practice, rather than on a decided case, as the English system of jurisprudence theoretically demands. The court quotes the text book dictum of Senor José Maria Manresa y Navarro, in his *Commentario a la Ley de Enjuiciamiento Civil,* to the effect that this method of recovery of damages for wrongful attachment is exclusive and that an independent action for damages would not lie. The Court further says "that there is nothing in this special procedure encroaching upon the right of a jury trial secured by the Federal Constitution, in suits at common law where the value in controversy exceeds twenty dollars. If it be assumed—a point which it is not necessary to decide—that that part of the Constitution is applicable and in

force in Porto Rico, the proceeding is not a suit at common law, but simply a method of ascertaining damages in a special proceeding in which property has been wrongfully seized."

It would seem that the effect of this decision would be to compel the United States District Court in Porto Rico to adopt the practice of the Porto Rican courts, and of course the question naturally presents itself as to what will be the position of other parties whose suits have been adjudicated by the District Court during the past five years in accordance with common law procedure. It looks as though much of the work might have to be done again. To one viewing the situation from the outside it would appear to be not only good law, but likewise most excellent policy for the United States District Court in Porto Rico to model its procedure as closely as possible upon that of the local courts. By the course heretofore followed, the native bar of Porto Rico, which includes in its ranks many members of wide cultivation and learning, is practically excluded from representing its own people in the United States Court. We certainly do not want to erect a protective tariff wall around American lawyers practicing in Porto Rico, whatever may be our views in general about that divine and beneficent institution.

Not the least interesting question involved in this suit is one that does not appear in the opinion at all, or at least it is dismissed by the Court as irrelevant to the decision. In the first briefs of the attorneys on either side the question was argued at length as to whether recovery could be had in a *civil* suit for damages for malicious prosecution under the provisions of Article 1902 of the Civil Code of Spain (§ 1803 of the Civil Code of Porto Rico): "A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to *repair* the damage done." In the very able brief for the plaintiff in error, presented by Messrs. James and John Harlan of Chicago, it is argued that the word *"repair"* in this Article applies only to the recovery of damages of a material nature that is capable of being exactly valued, but that damages to one's reputation or dignity through the wrongful act of another must be punished criminally according to the Spanish system of law, and that the proceedings must be under the provisions of the Criminal Code. The want of jurisdiction under the Civil Code in actions to recover damages for libel and slander was recognized by the legislative assembly of Porto Rico, after judgment in this case had been given in the lower court, by the passage of "An act authorizing civil actions to recover damages for libel and slander" approved, February 19, 1902. Revised Statutes and Codes of Porto Rico, 1902, p. 214. It was therefore argued that "at the time when the attachment writ complained of in this record was issued there was no such thing in Spanish jurisprudence as a civil action sounding in tort." If this contention is correct it gives to an English student approaching the study of Spanish law a satisfactory solution to the puzzling question as to the meagreness of the law of torts in the Spanish Civil Code. The old time confusion of the classic Roman law between torts and crimes seems to have been perpetuated in the Spanish system, and the Spanish lawyer must go to the Penal Code in many instances for the adjudication of a question of civil damages, as a sort of a side issue or an addendum to the punishment of crime.

The decision, however, leaves this question untouched as it went off on the affirmative decision of the third question propounded to the attorneys by the Supreme Court as the theme for an additional brief; namely, "under the law of civil procedure as existing in Porto Rico at the time of the attachment proceedings complained of, could the damages herein claimed have been allowed or assessed in that proceeding upon dissolution or discharge of the attachment? If so, was that mode exclusive of every other for ascertaining such damages?"

MR. JUSTICE WHITE with MR. JUSTICE MCKENNA dissented from the majority opinion of the Supreme Court on the ground that the question upon which the judgment was reversed was not saved in the court below, and that the error, if any, was a mere question of the mode of procedure involving no want of jurisdiction *ratione materiae.*

J. H. D.

THE INVESTIGATION OF CORPORATE MONOPOLIES.—The Supreme Court of the United States has recently given a clear and brief statement of its views respecting the right of a corporation officer to refuse to testify on the ground that his testimony may subject the corporation to a criminal prosecution. *Hale* v. *Henkel,* 26 Sup. Ct. Rep. 370. Hale was summoned before a grand jury in a proceeding under the Sherman anti-trust act, and upon being interrogated respecting certain transactions of the MacAndrews & Forbes Co., of which he was Secretary and Treasurer, refused to answer, on the ground that the Federal immunity law was not broad enough to embrace corporations, and that a corporation agent could therefore claim a constitutional right to refuse to answer questions tending to incriminate such corporation.

To this plea, MR. JUSTICE BROWN, speaking for the Court, replied: "The right of a person under the 5th amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person. A privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal, whether such principal were an individual or a corporation... The amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself;* and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation. As the combination or conspiracies provided against by the Sherman anti-trust act can ordinarily be proved only by the testimony of parties thereto, in the person of their agents or employees, the privilege claimed would practically nullify the whole act of Congress. Of what use would it be for the legislature to declare these combinations unlawful if the judicial power may close the door of access to every available source of information upon the subject? Indeed, so strict is the rule that the privilege is a personal one that it has been held in some cases that counsel will not be allowed to make the objection. We hold that the questions should have been answered."

E. R. S.